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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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**No. 860**

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UNITED STATES,

*vs.*

*Petitioner,*

THE ILLINOIS PURE ALUMINUM COMPANY,

A CORPORATION,

*Respondent*

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**BRIEF FOR RESPONDENT IN OPPOSITION TO PETI-  
TION FOR A WRIT OF CERTIORARI**

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**I**

**Opinion Below**

The opinion of the Court of Claims is reported at 67 F. Supp. 955.

**II**

**Jurisdiction**

The judgment of the Court of Claims was entered on October 7, 1946. The jurisdiction of the Court is invoked under the provisions of Section 3(b) of the Act of February 13, 1925, as amended.

## III

**Statute Involved**

The pertinent portions of the Act of October 16, 1941, 55 Stat. 742, as amended, 50 U. S. C. App., Sec. 721, are set forth in Appendix A.

## IV

**Questions Presented**

1. Whether, in a suit for just compensation by the owner of new, fabricated aluminum requisitioned by the United States, just compensation is limited to the amount offered by the taker, where, at the time of taking, the owner was free to hold the aluminum in stock or to sell the aluminum, as is, in the open market for permitted uses at a general market price and established ceiling price in excess of the amount offered by the United States.

2. Whether the Court erred in finding that just compensation was an amount in excess of the sum offered by the Government, where the finding is based upon a consideration of all relevant facts of record and is less than the general market and ceiling price at which respondent could have legally sold the property at the time and place of taking.

## V

**Statement**

Commencing early in 1941 the Office of Production Management, and its successor, the War Production Board, issued a series of orders known as the "M-1 series" restricting the use of aluminum (R. 17-18, Fdg. 2). On March 22, 1941, the *amount* of aluminum which manufacturers could purchase for use in manufacturing civilian or commercial products was restricted (R. 18, Fdg. 3).

On January 23, 1942, the use of aluminum was, by Supplementary Order M-1-e, restricted to the manufacture of items produced under contract for the Army, Navy, Lend-Lease, etc., and 15 commercial items or uses not including cooking utensils (R. 20, Fdg. 6). Respondent's normal business since before 1900 had been the manufacture of cooking utensils made from aluminum (R. 17, Fdg. 1). It had no war contracts at that time and by Supplementary Order M-1-e respondent was prohibited from using aluminum in the manufacture of cooking utensils for civilian use (R. 21, Fdg. 7).

On February 17, 1942, the acquisition and disposition of aluminum supplies was prohibited by Supplementary Order M-1-f, except for the manufacture of items permitted by Supplementary Order M-1-e, called "Essential Items". Aluminum supplies owned by manufacturers which were not being used in, or which were in excess of the immediate needs for, the fulfillment of purchase orders for "Essential Items"<sup>1</sup> were permitted (1) to be sold to anyone upon the buyer's certification to the seller that he would promptly use such aluminum in the manufacture of Essential Items; or (2) to be scrapped and disposed of as provided in Supplementary Order M-1-d (R. 21-2, Fdg. 8), that is, to a producer, dealer or approved smelter, for remelt (R. 19-20, Fdg. 5). Absent requisition, respondent could have held the aluminum in stock for future use (R. 29, Fdg. 20).

Thereafter WPB sent out letters requesting detailed reports from holders of idle and excessive inventories and offered to buy such inventories at a scale of prices established by WPB in what is called the Program Price List. The prices offered averaged from 50% to 75% of the lowest

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<sup>1</sup> Called idle and excessive inventories, defined as aluminum in excess of the amount required to be put into continuing production within 90 days in order to meet scheduled deliveries of "essential items" (R. 24, Fdg. 10).

base price, not including extras, for maximum quantities of the same items as quoted in the trade's current price lists, i. e., the price list of the Aluminum Company of America, dated October 1, 1941 (R. 23-24, Fdg. 10; R. 60-62). In addition to idle and excessive inventory supplies, WPB offered to purchase ingot, castings, forgings and scrap at the scrap ceiling price (R. 24, Fdg. 10).

The reports were received by WPB during March-September 1942 (R. 43). As the reports came in some effort was made by WPB to locate manufacturers who could use the material "as is" in the manufacture of Essential Items (R. 23, Fdg. 10) and when located they were put in touch with the holders and sales consummated between them in the general market (R. 25, Fdg. 12). In the case of respondent, however, the Government made no effort to find a permitted buyer who could use the material "as is". Rather, the Government requisitioned and took respondent's material immediately following receipt of its report. The report was received by WPB on April 25, 1942 (R. 24, Fdg. 11). On May 2, 1942, seven days later, WPB determined to requisition respondent's aluminum, not for remelt, but for sale or disposal to "manufacturers of military and naval equipment" (R. 25, Fdg. 13).<sup>2</sup> On May 16, 1942, the requisition was received by the marshal (R. 67) and on May 20, 1942, the property was taken by the marshal from respondent's storeroom and dumped into freight cars

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<sup>2</sup> There is some testimony that on May 10, 1942, a WPB representative took approximately 1,000 reports, those which had so far come in, including respondent's, to the offices of the Aluminum Company of America in Pittsburgh, and Reynolds Metals Company in Louisville, where he spent seven days comparing the materials these companies had orders for with the materials listed in the reports. Assuming respondent's report was one of them, it was obviously an idle gesture because WPB had already determined to requisition respondent's aluminum before this trip was made and the requisition was in the hands of the marshal before the representative returned to Washington (R. 43-45). Ninety days was considered a reasonable time for holders to dispose of their inventory (R.41).

thereby damaging it in such a way as to prevent any possibility of its ever being used again "as is", and shipped it directly to a smelter (R. 25-26, Fdg. 14).

The property requisitioned from respondent consisted of 146,048 pounds (R. 25, Fdg. 14) of aluminum sheets, circles, coils, tubing and rivets, which respondent had purchased cut to shapes and ready for use in the manufacture of cooking utensils without undue waste. All of it was new, bright finish, fabricated aluminum. It was pure commercial aluminum. None of it was scrap, obsolete, damaged or defective material (R. 26, Fdg. 17). It was purchased by respondent at a cost of \$46,121.92 (R. 30, Fdg. 25).

At the time of taking, respondent was privileged to have sold the material in the general market to manufacturers for permitted uses, "as is", at the same price charged at the time of taking by the Aluminum Company of America for the same commodities as shown by its October 1, 1941, price list, or at a price of \$42,847.18 provided respondent could have found a buyer. However, not knowing who had war contracts, respondent was unable to find a buyer in the market before the property was requisitioned (R. 29-30, Fdg. 22). There were buyers in the market who could have used respondent's aluminum (R. 57-58).

The cost of replacing the requisitioned property, had respondent been free to buy at that time, would have been \$42,847.18, i. e., the price charged by the Aluminum Company of America for the same commodities at the time of taking (R. 29-30, Fdg. 22). Had the inventory not been requisitioned respondent could have held the material in stock for use in fulfillment of Navy contracts which it later obtained, or in the manufacture of cooking utensils for civilian use after the emergency had passed and the various orders were no longer effective (R. 29-30, Fdgs. 22, 23).

There was an existing market for the sale of idle inventory "as is" at prices in excess of the WPB Program Price. In response to the "aluminum recovery program", 38,800,000 pounds of aluminum were reported, of which 38,200,000 pounds were disposed of under the program (600,000 pounds were requisitioned) (R. 64). Of this latter amount 7,219,770 pounds were scrap and ingots, and 1,345,859 pounds were castings and forgings, which the Government purchased at the scrap price (R. 25, Fdg. 12). The remainder, or 29,634,371 pounds consisted of idle and excessive inventories of sheets, circles, coils, tubing, rivets, etc., of which the Government purchased 8,960,854 pounds for remelting at the program prices ranging from 50% to 75% of the base prices shown in the trade's current price lists (R. 25, Fdg. 12) and the difference, or 20,673,517 pounds, was either retained, or sold by the holders in the general market to manufacturers, for permitted use "as is" (R. 58, 64-65). Thus, it appears that only 30% of all idle and excessive aluminum inventories reported were purchased by the Government at the Program price.

On July 28, 1942, petitioner made a preliminary determination that the Program price of \$30,791.83 was fair and just compensation for the property taken and so advised respondent. On October 19, 1942, respondent received from WPB a copy of Award of Compensation in the amount of \$30,791.83. Respondent rejected the determination, accepted partial payment in the amount of \$15,395.92 (50%) on January 18, 1944 (R. 26, Fdg. 16). The instant action was subsequently instituted to obtain a judicial determination of fair and just compensation.

The Court below awarded judgment to respondent upon a finding that just compensation for the value of the interest taken at the time it was taken was \$36,420.10 (R. 34).



## VI

**The Writ Should Be Denied**

A. *The alleged issue, of National importance, i. e., value in a market "subject to complete governmental control," is not raised by the facts.*

Petitioner's contention that this case raises a novel question as to market value, where the market is subject to complete governmental control, lacks reality in the light of the facts. Respondent had, in addition to the markets mentioned by petitioner, the privilege of selling its aluminum in the general market, at the same price charged by the Aluminum Company of America for the same commodities, or at a price of \$42,847.18, which is a greater price than the award made to respondent by the Court below (R. 29-30, Fdg. 22). It is implicit in this finding of the Court of Claims that this higher price would not exceed the applicable price ceiling under OPA regulations.<sup>3</sup>

There did exist, in fact, markets other than those at the scrap market and the WPB Aluminum Recovery Program prices. It is established herein that over twenty million pounds of aluminum of the general type of that held by respondent were either retained, or sold in the general market, for "as is" use, while only approximately 9,000,000 pounds were sold to the government for remelt at the

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<sup>3</sup> The Government's OPA expert, Kurt J. Rahlson, testified that a sale of respondent's inventory of aluminum on May 20, 1942, the date of taking, would have been subject to the OPA "general maximum price regulation which became effective on May 11, 1942, and froze each seller's price at the highest price at which he had sold the same material during March, 1942." Since respondent did not engage in selling such aluminum supplies, and, therefore, had no maximum price of its own, the witness explained that respondent would have been authorized "to sell at the nearest maximum price that could be found for it, which in this instance would have been the price by the Aluminum Company of America" (R. 65-67).

Aluminum Recovery Program price. (See *supra*, p. 6). The general market prices, as reflected by the ALCOA price list, were from 33 $\frac{1}{3}$ % to 100% higher than the Recovery Program prices.

Petitioner should not now be heard to maintain that the general market was not available to respondent, when the decision to requisition its aluminum was made within a week after the receipt of respondent's inventory, and the actual requisition was completed in less than a month. Ninety days was considered to be a reasonable time within which to permit a holder of inventory to dispose of it in the general market (R. 41). Moreover, respondent is entitled to just compensation measured by the general market price regardless of whether it was in a position to find an immediate buyer. *Westchester County Park Commission v. U. S.*, [2 Cir.], 143 F. (2d) 688, 692-3, cert. den., 323 U. S. 726.

Contrary to petitioner's statement (Pet., p. 10), the Court of Claims did not hold and the facts do not support a conclusion that the market was "subject to complete governmental control". There may be pending cases involving this question, or the effect of a legal price ceiling less than the amount of the award, but neither question is involved in this case.

*B. Petitioner's claims of conflict are unfounded.*

In *Cudahy Brothers Co. v. U. S.*, 155 F. (2d) 905 (CCA-7), the established market price, the OPA ceiling price and the amount of the Government award were identical. Plaintiff there contended that the market price, because of the OPA ceiling, was an artificial one and should be disregarded, and attempted to establish a higher value by showing anticipated profits. There is no conflict with the

principles of the decision in this case, since respondent makes no claim for loss of profits, and the award made by the Court below is less than the applicable OPA ceiling price, and the prevailing general market price.

It may be that the petitioner is seeking to import into this case an issue not previously raised by it or considered by the Court below, *i. e.*, whether the Aluminum Recovery Program price represented a price ceiling on sales of aluminum for remelt and is the applicable ceiling. The facts, however, do not present this issue. Up to the moment of requisition, respondent could have sold its aluminum for use "as is" in the general market at the prices charged by ALCOA, which was respondent's ceiling price, if it could have found a buyer. The amount of money necessary to place respondent in as good a position pecuniarily as it would have occupied, if its property had not been taken, is not affected by the mere act of requisition, the amount offered by the Government, nor the use made of the property by the Government. *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312; *U. S. v. New River Collieries Co.*, 262 U. S. 341.

The Aluminum Recovery Program price was not itself a price ceiling established by OPA; it was an exception to the application of the ceiling price on aluminum scrap, if idle and excessive inventories were sold as scrap to Metals Reserve Company "pursuant to the program" (R. 27, Fdg. 18). Moreover, respondent's property was not requisitioned for remelt, but for sale or disposal to "manufacturers of military and naval equipment" (R. 25, Fdg. 13).

The only noteworthy difference in result between the *Cudahy* case and the instant one, is that respondent here was made to bear the hypothetical expense of finding a purchaser, or of storing its supplies until a later time, so that

respondent did not receive the full ceiling and market price as did the claimant in the *Cudahy* case.<sup>4</sup>

*C. The decision below conforms to the applicable decisions of this Court*

The Court below held that the value of respondent's aluminum at the time it was taken was \$42,847.18, according to the ALCOA price list in effect at that time, which largely governed the market price; that the actual value for purposes of just compensation must be found from all of the facts and circumstances disclosed by the record; that the wartime regulations and controls necessarily affected values; that had respondent's property not been requisitioned, it would have been faced with the necessity of going to the expense of finding a buyer who had a war contract, or of holding its stocks until the emergency had passed, which would mean a tie-up of capital and expense of storage; and that in view of all the facts and evidence, and after having "taken into consideration essential wartime priorities, restrictions, and regulations which necessarily affected the value", the amount which should be paid to respondent as just compensation for the value of the interest taken at the time it was taken is \$36,420.10 (R. 34).

Thus, the Court below awarded respondent just compensation in an amount which, in its judgment, might have been arrived at by fair negotiations between a willing buyer and a willing seller, taking into account all considerations

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<sup>4</sup> *Graves v. United States*, 62 F. Supp. 231 (W. D., N. Y.), *Lessner Plumbing & Heating Co. v. United States*, 64 F. Supp. 931 (S. D., N. Y.) and *Louisville Flying Service v. United States*, 64 F. Supp. 938 (W. D., Ky.), the District Court cases cited by petitioner, are not in conflict. The *Graves* case involved a finished product (cast bronze blowtorch handle brackets), the use of which had been prohibited by the Government and for which there was no market in its existing state. The *Lessner* case involved a small unmarketable quantity (1,577.7 pounds) of odds and ends of brass pipe, left over from repair jobs. In the *Louisville Flying Service* case the claimant was awarded the full formula price, as was the claimant in the *Cudahy* case, *supra*.

that fairly might be brought forward and reasonably given substantial weight in such bargaining, in accordance with *Olson v. U. S.*, 292 U. S. 246.

In reaching its determination, the Court gave consideration to the character of respondent's aluminum, and gave full effect to the essential regulations and controls exercised by the Government in wartime, and made an award to respondent to place it in as good a position pecuniarily, after considering the entire record, as it would have been in had its property not been taken. The Court's decision accords with the settled law. *Monongahela Navigation Co. v. U. S.*, *supra*; *U. S. v. New River Collieries Co.*, *supra*; *Bowles v. Willingham*, 321 U. S. 503; *Seaboard Airline Railway Co. v. U. S.*, 261 U. S. 299; *Olson v. U. S.*, *supra*; *Brooks-Scanlon Corp. v. U. S.*, 265 U. S. 106.

### Conclusion

The decision of the Court below is correct and involves neither a conflict of decision nor a question of general importance. It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February, 1947.

**APPENDIX A**

Section 1 of the Act of October 16, 1941, 55 Stat. 742, as amended by the Act of March 27, 1942, 56 Stat. 181 (50 U. S. C. App., Sec. 721), provided in part as follows:

Whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1943, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act \* \* \* but each such determination shall be made as of the time it is requisitioned \* \* \* in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United

States in the manner provided by sections 24 (20) and 145 of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. • • •

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